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No. 82-2120

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

THOMAS F. SMITH, JR., et al.,
Petitioners

v.

WILLIAM P. ROBINSON, JR., Rhode Island Associate Commissioner of Education, et al.,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF OF *AMICI CURIAE*

THE ASSOCIATION FOR RETARDED CITIZENS OF THE UNITED STATES, THE NATIONAL MENTAL HEALTH ASSOCIATION, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE AMERICAN COUNCIL OF THE BLIND, THE AFFILIATED LEADERSHIP LEAGUE OF AND FOR THE BLIND, THE NATIONAL ASSOCIATION OF THE DEAF, THE INTERNATIONAL ASSOCIATION OF PARENTS OF THE DEAF, THE AMERICAN COALITION OF CITIZENS WITH DISABILITIES, THE DISABILITIES RIGHTS EDUCATION DEFENSE FUND, THE DEVELOPMENTAL DISABILITIES ADVOCACY NETWORK, THE PENNSYLVANIA ASSOCIATION FOR RETARDED CITIZENS, THE PENNSYLVANIA ASSOCIATION FOR CHILDREN WITH LEARNING DISABILITIES, ADVOCACY, INC., UNITED CEREBRAL PALSY OF NEW YORK CITY, INC., AND STATEWIDE YOUTH ADVOCACY, INC.
IN SUPPORT OF REVERSAL

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INTEREST OF *AMICI CURIAE*

Pursuant to Rule 36 of the Rules of the Supreme Court,[1] *amici* file this brief in support of petitioners Thomas, Ursula and Tommy Smith.

Amici are 15 non-profit organizations concerned with the welfare of handicapped individuals.[2] As such, *amici* count among their members the parents of thousands of handicapped children who depend on the pub-

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1. Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

2. *Amici* include:

(1) The Association for Retarded Citizens of the United States, a voluntary organization of 300,000 members devoted to promoting the welfare of mentally retarded children and adults;

(2) The National Mental Health Association, a citizens' organization of one million lay and professional members whose primary purpose is to encourage efforts to provide better educational and other services for mentally ill children and adults;

(3) The American Orthopsychiatric Association, founded in 1924. AOA is a professional educational organization of more than 10,000 psychologists, psychiatrists, nurses, social workers, educators and other individuals who serve mentally ill and mentally retarded persons;

(4) The American Council of the Blind, the nation's largest non-profit membership organization of blind and visually impaired individuals. ACB seeks to ensure that blind people, including blind school-aged youngsters, have the opportunity to participate fully in all aspects of American life;

(5) The Affiliated Leadership League of and for the Blind of America, a non-profit organization consisting of eighty national, state and local organizations of and for blind people, including almost all of the national organizations of and for blind people. The ALLB is dedicated to advancing the rights of and obtaining services for blind people;

(6) The National Association of the Deaf, a national non-profit organization of approximately 18,000 members who are hearing-impaired adults, parents of hearing-impaired children, and professionals who serve deaf individuals. The NAD is the largest consumer organization of hearing impaired people in the United States;

(7) The International Association of Parents of the Deaf, an international organization composed primarily of parents of deaf individuals. The purpose of IAPD is to provide information

lic education system for their schooling. The issue presented herein — the availability of attorney's fees to parents who prevail in cases seeking special education for their handicapped children — is therefore of acute practical concern to *amici*.

NOTE — *(Continued)*

and support to families with children who are deaf or hard of hearing;

(8) The American Coalition of Citizens with Disabilities, a national association composed of national, state and local organizations of and for disabled persons. ACCD represents some eight million disabled individuals, parents of disabled persons, and service providers, and is the only national coalition of disability groups of all types;

(9) The Disability Rights Education and Defense Fund, a non-profit corporation founded in 1979 by disabled adults and parents of disabled children. DREDF addresses issues of disability rights from the perspective that all disabled people are entitled to live full and integrated lives;

(10) The Developmental Disabilities Advocacy Network of Pennsylvania, an independent, non-profit agency which has been designated by the Governor of Pennsylvania as the Commonwealth's Protection and Advocacy System. DDAN is responsible for providing protection and advocacy services to Pennsylvania's developmentally disabled children and adults;

(11) The Pennsylvania Association for Retarded Citizens, an organization of approximately 14,000 persons most of whom are parents of retarded individuals. PARC has long been concerned with the educational services available to retarded children and brought the landmark case concerning the right of such children to attend public school, *PARC v. Pennsylvania*, 334 F.Supp. 1257 (E.D.Pa. 1971), 343 F.Supp. 279 (E.D.Pa. 1972);

(12) The Pennsylvania Association for Children With Learning Disabilities, founded in 1967, an organization of approximately 800 persons most of whom are parents of learning-disabled children. PACLD assists parents in understanding their children's rights to special education services and obtaining the services to which they are entitled;

(13) Advocacy, Inc., an independent, non-profit organization which serves as the Protection and Advocacy agency for the State of Texas. As such, Advocacy, Inc. provides direct services to developmentally disabled children and adults throughout Texas;

Parents of handicapped youngsters labor under financial burdens unfamiliar to those who have nondisabled children. Expenditures for special medical procedures, therapies, psychological treatment and the like are the norm rather than the exception. Such expenditures typically leave little or no funds with which to retain a lawyer. Yet, as this case shows, legal representation is sometimes necessary in order to secure the handicapped child's basic educational entitlements.

When a legal battle occurs, parents may — as in this case — find themselves opposed by an impressive array of legal talent representing local school authorities as well as state education officials. Parents cannot take on such adversaries, even if their child's future is at stake, without the assistance of an attorney; parents who cannot afford to hire an attorney therefore generally cannot assert their child's rights. Agencies such as *amici*, moreover, can provide legal representation in only a small percentage of cases.

The consequence of an affirmance herein, therefore, will be that violations of the rights of handicapped children will go without redress. This might give little cause for concern if the controversies at issue involved only esoteric disputes over educational methodology; such, however, is not the case.[3] As Tommy Smith's case

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(14) United Cerebral Palsy of New York City, Inc., a nonprofit corporation formed to advance the interests of cerebral palsied individuals in New York. UCP provides direct services to children and adults and conducts public and professional education and advocacy programs;

(15) Statewide Youth Advocacy, Inc., a not-for-profit corporation, located in Rochester, N.Y., and organized in 1976 for the purpose of securing the rights of children and youth to quality public services in the area of child welfare, juvenile justice, and public education.

3. Indeed, such disputes often will not raise legally cognizable claims. *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

demonstrates, these lawsuits — while relatively rare[4] — often involve the fundamental problem of discriminatory exclusion from education opportunity. Congress has clearly provided that in such cases, as in other litigation to secure civil and constitutional rights, a prevailing plaintiff shall recover attorney's fees. For these reasons, *amici* have sought this opportunity to be heard and to urge reversal of the decision below.

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4. The total number of such lawsuits is relatively small. In 1980, for example, fewer than .007% of children (256 children nationwide) in publicly funded special education programs filed a complaint in either state or federal court relating to any aspect of their special education. National Center for State Courts, *Student Litigation: A Compilation and Analysis of Civil Cases Involving Students, 1977-1981*, 22 (1981).

STATEMENT OF THE CASE

Amici adopt petitioners' Statement of the Case, with the following additional observations.

This litigation arose when Rhode Island education authorities — *i.e.*, respondents and a local school board — disagreed with the Rhode Island Department of Mental Health, Retardation and Hospitals (MHRH) over the question of which of them was responsible for the education of Tommy Smith, an eight-year-old handicapped child. Because Tommy was emotionally disturbed, respondents took the position that MHRH should educate him; MHRH, which had no services available for Tommy and in any event would not have provided services free of charge to Tommy's parents, contended that Tommy was respondents' responsibility.

The agencies did not, however, resolve their disagreement through inter-agency negotiation or by seeking a declaratory judgment in a state court. Instead, in an "outpouring of bureaucratic compassion," *cf. Rabinowitz v. New Jersey State Board of Education*, 550 F.Supp. 481, 482 (D.N.J. 1982), they both simply declined to serve Tommy, thus shifting to Tommy's parents the burden of obtaining a judicial resolution of the inter-agency dispute. That task required more than five years of federal litigation.

At no time did this litigation involve any question over whether Tommy needed special education services, or whether he was entitled to receive such services from the State. There was likewise no dispute over the content of the program that Tommy should receive or the facility in which that program should be delivered. Thus, the issues presented in *Board of Education of the Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), never arose here.

Since this lawsuit was needed not in order to make any determination about Tommy, but rather to sort out the respective duties of various Rhode Island State agen-

cies, it is ironic that the task of prosecuting the case fell upon Tommy's parents. Nevertheless, because their son would otherwise have received no education, petitioners had no choice but to litigate the matter in the District Court, the Supreme Court of Rhode Island, and the Court of Appeals for the Fifth Circuit. The substantial attorney's fees that the Smiths incurred during this extended odyssey are the subject of the present proceeding.

SUMMARY OF ARGUMENT

Petitioners are entitled to a fee award under each of two statutes: §505 of the Rehabilitation Act of 1973, 29 U.S.C.A. 794a(b) ("§505"), and the Civil Rights Attorney's Fees Awards Act, 42 U.S.C.A. 1988 ("§1988").

Fees are available under §505 because petitioners raised a substantial claim under §504 of the Rehabilitation Act, 29 U.S.C.A. 794 ("§504"), *i.e.*, that respondents had discriminated against Tommy on the basis of his handicap; and because petitioners obtained all of the relief that they sought. §505, which expressly authorizes a fee award under such circumstances, contains no exception for cases in which plaintiffs' claim might also have been raised under the Education for All Handicapped Children Act, 20 U.S.C.A. 1401 *et seq.* ("EAHCA"). Moreover, the EAHCA did not expressly or by implication limit or preclude petitioners' §504 claim.

Fees should be awarded under §1988 because petitioners raised substantial Due Process and Equal Protection Claims and obtained all of the relief that they sought. Section 1988 contains no exception for cases in which constitutional claims are ultimately avoided in favor of a decision on statutory grounds; on the contrary, settled precedent dictates that fees be awarded in such cases.

ARGUMENT

I. PETITIONERS ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER §505 OF THE REHABILITATION ACT OF 1973

A. *Petitioners Prevailed in a Case Raising Substantial Claims Under §504 of the Rehabilitation Act and are Therefore Entitled to Attorney's Fees Under §505 of That Act*

As a basis for an award of fees in this case, petitioners invoked §505 of the Rehabilitation Act of 1973, 29 U.S.C.A. 794a ("§505"). That statute expressly authorizes fee awards to prevailing parties in cases raising claims under §504 of the Rehabilitation Act, 29 U.S.C.A. 794 ("§504").

The Court of Appeals did not dispute petitioners' assertion that they had raised §504 claims or that they had "prevailed" within the meaning of §505.[5] Rather, the court held that another statute — the Education for All Handicapped Children Act (EAHCA)[6] — prohibits such awards in cases that also fall within the scope of that statute, even if all of the requirements of §505 are met.

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5. The Court of Appeals questioned whether a private cause of action exists under §504, but did not rest its holding on this ground. *Smith v. Cumberland School Committee*, 703 F. 2d 4, 9 (1st Cir. 1983). Every other Court of Appeals to consider the issue has found such a cause of action. *Miener v. Missouri*, 673 F.2d 969 (8th Cir. 1983), *cert. denied*, 103 S.Ct. 215 (1982) (collecting cases). Moreover, this Court has held that a private right of action exists to enforce Title VI of the Civil Rights Act of 1964, *Guardians Ass'n v. Civil Service Commission*, 103 S.Ct. 3221 (1983), after which §504 was patterned, *Community Television of Southern California v. Gottfried*, 103 S.Ct. 885, 892 (1983). *Cf. Cannon v. University of Chicago*, 441 U.S. 677 (1979) (private right of action under comparable language of Title IX of Education Amendments of 1972). The question of the existence of a private cause of action under §504 is presently before this Court in *Le Strange v. Consolidated Rail Corp.*, 687 F.2d 767 (3d Cir. 1982), *cert. granted sub nom. Consolidated Rail Corp. v. Darrone*, 103 S.Ct. 1181, 1765 (1983) (No. 82-862).

6. 20 U.S.C. §1401 *et seq.*

In so holding, the court imported into §505 an exception that appears nowhere in the language or legislative history of §505, and accomplished the illogical result of permitting a statute enacted in 1975 partially to repeal by implication one enacted three years *later*.

Section 504 provides in relevant part:

> No otherwise qualified handicapped individual in the United States, as defined in §706(7) of this title, shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .

Section 505(b), the attorney's fees statute associated with §504, provides:

> In any action or proceeding to enforce or charge a violation of a provision of this title [including §504], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

The language of §505 is virtually identical to that of the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C.A. §1988, and is therefore to be given a like construction. *Northcross v. Board of Education*, 412 U.S. 427(1973); *Hensley v. Eckerhart*, 103 S.Ct. 1933, 1939, n.7 (1983).[7] Accordingly, as under §1988, a party "prevails" within the meaning of §505 by raising a substantial §504 claim and by achieving at least some of the benefit sought through the litigation, *Hensley v.*

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7. The legislative history further confirms Congress' intent that the statutes be similarly construed. *See* 124 Cong. Rec. 30346 (remarks of Senator Cranston, author of the provision, emphasizing intent "that interpretation of the attorney's fee provision . . . be analogous to interpretations of the Civil Rights Attorney's Fees Act of 1976"); 37508 (Senator Stafford) (1978).

Eckerhart, *supra*, 103 S.Ct. at 1939. It is immaterial whether such benefit is obtained by way of an actual determination of the §504 claim, a settlement, or (as here) a favorable determination on another, non-fee claim. Moreover, where relief is obtained by way of settlement or on another legal ground, the court need not determine whether the plaintiff would have won on the merits of the §504 claim had the matter proceeded to decision. *Maher v. Gagne*, 448 U.S. 122 (1980); *United Handicapped Federation v. Andre*, 622 F.2d 342 (8th Cir. 1980); *Disabled in Action v. Mayor & City Council of Baltimore*, 685 F.2d 881 (4th Cir. 1982).[8] Finally, where a plaintiff has "prevailed" by any of the above routes, fees should ordinarily be awarded. *Hensley v. Eckerhart*, *supra*, 103 S.Ct. at 1937.

There is no question that petitioners herein raised substantial claims under §504. In their Complaint, petitioners charged that that statute was violated by respondents' proposal to terminate the funding for Tommy's educational program. Moreover, that action was to be taken precisely because of Tommy's handicap. As respondents acknowledged, it was Tommy's emotional disturbance that led them to decide that they would no longer take responsibility for his education. Respondents proposed that Tommy instead be served by the public mental health system, which had a lengthy waiting list for services and would have charged Tommy's parents a fee for any services provided. By contrast, respondents

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8. *See also* comparable decisions under the attorney's fee provision of Title VII of the Civil Rights Act of 1974, 42 U.S.C. §2000e-5(k), which make clear that the policy of avoiding unnecessary determinations on the merits extends to statutory as well as constitutional claims. *Young v. Kenley*, 641 F.2d 192 (4th Cir. 1981), *cert. denied sub nom. Long v. Bonnes*, 455 U.S. 961 (1982). A contrary rule would create a substantial disincentive to settlement, since there would be no possibility of avoiding an eventual decision on the underlying claims; moreover, the court would be burdened with a full trial on the merits in the context of a collateral motion.

provided a free education to all non-handicapped children and to all children with handicaps other than emotional disturbance.[9]

Tommy's situation was thus precisely that proscribed by §504: he was to be "excluded from the participation in, . . . denied the benefits of, [and] subjected to discrimination" within a federally-assisted program as a result of his handicap. The courts have had no difficulty finding a §504 violation in cases of total, or even partial, exclusion from free educational services. *Tatro v. Texas*, 703 F.2d 823 (5th Cir. 1983), *cert. granted*, 52 U.S.L.W. 3435 (Dec. 5, 1983) (No. 83-558); *New Mexico Association for Retarded Citizens v. New Mexico*, 678 F.2d 847 (10th Cir. 1982); *New York State Association for Retarded Citizens v. Carey*, 612 F.2d 644 (2d Cir. 1979); *Hairston v. Drosick*, 423 F. Supp. 180 (S.D.W.Va. 1976).[10]

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9. Second Amended and Supplemental Complaint at 8.

10. Indeed, while the issue is not presented in this case, the courts have found §504 violations not only where a child was partially or totally excluded from services, but also where the services provided were inappropriate — *i.e.*, not suited to the child's particular needs. 34 C.F.R. Part 104, Subpart D; *New Mexico Ass'n for Retarded Citizens v. New Mexico, supra; Georgia Ass'n for Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir. 1983); *S-1 v. Turlington*, 635 F.2d 342 (5th Cir. 1981), *cert. denied*, 454 U.S. 1030 (1981); *Jose P. v. Ambach*, 557 F. Supp. 1230 (E.D.N.Y. 1983); *Sanders v. Marquette Public Schools*, 561 F.Supp. 1361 (W.D.Mich. 1983); *contra, Timms v. Metropolitan School Dist.*, 718 F.2d 212 (7th Cir. 1983). Such holdings are consistent with this Court's decision in *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). In *Davis*, the Court held that respondent was not a "qualified" handicapped person within the meaning of §504. By contrast, Tommy Smith and all other children of school age are "qualified" to receive an education. 34 C.F.R. §104.3(k) (2); *New Mexico Ass'n, supra; Jose P., supra*, 557 F. Supp. at 1235-36. Moreover, the education provided must be meaningful in light of the handicapped child's needs if discrimination is to be avoided, *cf. Lau v. Nichols*, 414 U.S. 563 (1974). The Court need not reach this issue, however, since petitioners' claim was that Tommy was totally excluded from respondents' program. *See Marvin H. v. Austin Indep. School Dist.*, 714 F.2d 1348, 1356, n. 13 (5th Cir. 1983).

There is also no doubt that petitioners obtained precisely the relief that they sought under §504, *i.e.*, an order compelling respondents to educate Tommy. To be sure, that order was premised primarily on state law, the District Court finding it unnecessary to reach the merits of petitioners' federal claims. The Court of Appeals acknowledged, however, that this fact did not defeat petitioners' entitlement to fees under §505: "[A]ttorney's fees are available under [§505] whenever a party presents a substantial §504 claim even if they do not ultimately prevail under that claim," 703 F.2d at 9.

Nevertheless, attorney's fees under §505 were denied. The difficulty was that this action not only raised §504 claims but also "[fell] within the parameters of" another statute — the EAHCA. 703 F.2d at 7. Under these circumstances, the court held, "the EAHCA's comprehensive remedial scheme entails a rejection of fee-shifting that properly limits the fees provision of the more general Rehabilitation Act." 703 F.2d at 10. In the court's view, because the EAHCA did not expressly authorize fee awards, such awards were also barred under §505 with respect to §504 claims that *might have been* decided under the EAHCA.

The court's conclusion contravenes the express language of §505, which contains no exception for §504 cases that also implicate other statutes. On the contrary, §505 authorizes a fee award to the prevailing party in "any" action or proceeding to enforce §504. This Court has made clear the result that must be reached under these circumstances. "Absent a clearly expressed legislative intention to the contrary, [the] language [of a statute] must ordinarily be regarded as conclusive." *North Dakota v. United States*, 103 S.Ct. 1095 (1983).

The legislative history of §505 lends no support to the construction adopted by the Court of Appeals. Section 505 was enacted in 1978,[11] several years after pas-

11. P.L. 95-602, Title I, §119.

sage of §504 and the EAHCA. By that date, cases involving the education of handicapped children had been decided under both statutes[12] and the Department of Education was administratively enforcing both acts.[13] Congress was therefore necessarily aware, when it enacted §505, that one result of that act would be to allow attorney's fees in certain cases that also fell within the scope of the EAHCA. Nevertheless, Congress made no exception for such cases, nor was any such exception ever discussed. The rule to be applied in these circumstances is clear:

> We have emphasized in the recent past that "[o]ur individual appraisal of the wisdom or unwisdom of a particular [legislative] course . . . is to be put aside in the process of interpreting a statute." *TVA v. Hill*, 437 U.S., at 194, 98 S.Ct., at 2302 (1978). Our task, rather, is the narrow one of determining what Congress meant by the words it used in the statute; once that is done our powers are exhausted.

Diamond v. Chakrabarty, 447 U.S. 303, 318 (1980).

The Court of Appeals' conclusion that §505 incorporates an exception for claims that also fall within the EAHCA is in effect a holding that the EAHCA repealed §505 by implication with respect to cases presenting such claims. Such is logically impossible, since §505 was enacted three years *after* the EAHCA.[14] It is un-

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12. *E.g., Hairston v. Drosick, supra*; *New York State Ass'n for Retarded Children v. Carey*, 466 F.Supp. 479, 466 F. Supp. 487 (E.D.N.Y. 1978), *aff'd*, 612 F.2d 644 (2d Cir. 1979); *Brown v. Dist. of Columbia Bd. of Educ.*, C.A. 78-1646 (D.D.C. Sept. 13, 1978). Numerous other lawsuits raising claims under both acts had been filed and were awaiting decision.

13. See the numerous administrative policy interpretations and rulings under both statutes collected in the Education for the Handicapped Law Report, vols. 2, 3 (CRR Publishing Co.).

14. The EAHCA was enacted in 1975 as P.L. 94-142; §505 was enacted in 1978 as part of P.L. 95-602.

usual enough to find that a subsequent statute has repealed an earlier act by implication, *Kremer v. Chemical Construction Co.*, 456 U.S. 461 (1976); it is entirely unprecedented to find the reverse.

Amici recognize that a different analysis might be required if the EAHCA actually forbade awards of attorney's fees in cases raising claims cognizable under that statute. Under such circumstances, the EAHCA and §505 would be in conflict, and the Court would necessarily face the question of which controls. *Cf. Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976). Such problems of statutory construction do not arise, however, where (as here) no conflict exists. *Watt v. Alaska*, 451 U.S. 259, 266-67 (1981). Congressional silence on the issue of attorney's fees in one statute simply cannot, under this Court's precedents, constitute the basis for nullification of express language on the subject in another enactment.[15]

It does not necessarily follow, and the Court need not here decide, that every case raising claims under the EAHCA also presents substantial §504 issues and therefore may result in a fee award. Arguably, some claims involving the provision of education to a handicapped child do not constitute substantial claims under §504 and therefore could not implicate §505.[16] That issue, however, is not present in this case, since petitioners' claims

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15. These principles are entirely consistent with the "American rule" that an award of counsel fees requires express authorization, *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). *Alyeska* contains no requirement that *every* statute under which a claim might have been raised contain such an express provision. Here, since §505 expressly authorizes fees, the requirements of *Alyeska* are fully met.

16. For example, the EAHCA requires that the school system develop a written "individualized education program," containing specified information and developed in accordance with specified procedures for each handicapped child, 20 U.S.C. §1401(19). Section 504 does not necessarily impose identical requirements, 34 C.F.R. §104.33(b)(2).

here were well within the anti-discrimination mandate of §504.[17] Section 505 clearly instructs *at least* that fees be made available here, and in the face of such clear Congressional instructions this Court's "inquiry comes to an end," *Howe v. Smith*, 452 U.S. 473, 483 (1981).[18]

Thus, the plain language as well as the legislative history of §505 mandate an award of fees to petitioners herein.

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17. This is not a case in which plaintiffs sought to establish the content of an "appropriate" education for a handicapped child, as did plaintiffs in *Bd. of Educ. v. Rowley*, *supra*. There was no dispute between the parties concerning the appropriateness of Tommy's program; the question was instead whether respondents would continue to fund that program. Therefore, the issue of whether attorney's fees are recoverable by the prevailing party in a case such as *Rowley* is not before the Court.

18. This construction of §505 also does not imply that plaintiffs in such cases are relieved from their obligation to exhaust administrative procedures. Virtually any §504 claim that also falls within the EAHCA is, like the EAHCA claim, subject to exhaustion; moreover, the administrative procedures in question will be either identical or equivalent to those afforded under the EAHCA. 34 C.F.R. §104.36 provides:

> A recipient that operates a public elementary or secondary education program shall establish and implement, with respect to actions regarding the . . . educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of §615 of the Education of the Handicapped Act [20 U.S.C. §1415] is one means of meeting this requirement.

Thus, §505 simply does not come into play in such cases until exhaustion has occurred. *See Turillo v. Tyson*, 535 F.Supp. 577 (D.R.I. 1982); *Patsel v. Dist. of Columbia Bd. of Educ.*, 530 F.Supp. 660, 665 (D.D.C. 1982).

B. *Section 504 and the EAHCA Grant Independently Enforceable Substantive Rights*

While it did not decide the issue, the Court of Appeals expressed uncertainty over whether the EAHCA "indicate[s] a congressional intent to preclude 'overlapping' actions under §504." 703 F.2d at 9-10. If Congress had intended the EAHCA to "preclude" a plaintiff from relying on §504 wherever the claim might alternatively be raised under the EAHCA, attorney's fees under §505 might indeed be unavailable here; concededly, §505 is inapplicable where there exists no §504 claim. However, the language and history of the two statutes demonstrate that they were intended to create independent substantive rights.

Section 504, enacted in 1973, prohibits discrimination on the basis of handicap in "any" federally-assisted program. By its terms, §504 applies to federally-assisted programs of elementary and secondary education as well as to all other federally-funded activities.[19] The EAHCA, enacted two years later, is a funding statute which authorizes grants to assist states with the education of handicapped children. In states that choose to accept such grants, education programs for handicapped children are required to meet the substantive requirements of the EAHCA. *Board of Education v. Rowley, supra.*

Unquestionably, the requirements of the EAHCA and §504 overlap in some (although certainly not all)[20]

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19. In a remark directly applicable to the facts of the present case, Senator Humphrey, the primary sponsor of S. 3044, the 1972 bill that became the model for §504, stated:

> [T]oo often we keep children, whom we regard as "different" or a "disturbing influence", out of our schools and community activities altogether, rather than help them develop their abilities in special classes and programs. . . .
>
> Every child — gifted, normal, and handicapped — has a fundamental right to educational opportunity . . .

118 Cong. Rec. 525 (1972).

20. The class of individuals protected by the EAHCA differs from that protected by §504 in certain respects. *See infra; Georgia*

respects. It does not follow, however, that the EAHCA displaced §504 with respect to those overlapping areas — *i.e.*, that it repealed §504 by implication as to such claims. This Court has consistently held that repeals by implication are not favored, *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 88 (1982); *Watt v. Alaska, supra*, 451 U.S. at 266-67, quoting *Morton v. Mancari*, 417 U.S. 535, 549 (1974). Such repeals may be found only under the circumstances specified in *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936):

> . . . (1) [W]here provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act. But, in either case, the intention of the legislature to repeal must be clear and manifest . . .

Kremer v. Chemical Construction Co., supra, 456 U.S. at 468; *Radzanower v. Touche Ross, supra* (reaffirming *Posadas*). Neither of these requirements, however, is met here.

First, in the absence of "manifest" Congressional intent to repeal, no repeal may be found unless an actual and irreconcilable *conflict* exists. *Watt v. Alaska, supra*, 451 U.S. at 266-67; *Posadas v. National City Bank, supra*. Here, there is no conflict between the statutes. The acts are by their terms entirely consistent. Moreover, the substantial body of caselaw decided under both acts reveals no instance in which such a conflict has been alleged, much less found to exist. In the absence of

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Association of Retarded Citizens v. McDaniel, supra. See also the differing definitions of "handicapped" under the two statutes, 20 U.S.C. §1401(1) and 29 U.S.C. §706(6); the express age limitation contained in the EAHCA, 20 U.S.C. §1412(2)(B); and the regulations at 34 C.F.R. §104.4, which have no counterpart under the EAHCA.

a conflict, the mere fact that the EAHCA is more specific than §504 does not demonstrate that a repeal by implication occurred.

The federal Department of Education (DOE),[21] which is charged with enforcement of the two statutes, likewise treats the acts as affording independent, consistent rights. *See* 42 Fed. Reg. 22690-92 (May 4, 1977) and 42504 (Aug. 23, 1977) (adopting regulations under the two acts and stating that such regulations, while differing in certain respects, are consistent with each other).[22] Accordingly, DOE administratively enforces both statutes.[23] DOE's view that the statutes impose no conflicting requirements merits deference here. *Blum v. Bacon*, 457 U.S. 132 (1982).

Moreover, as the Court of Appeals for the Eleventh Circuit has observed, the existence of significant differences between the two statutes argues against the conclusion that one was intended to displace the other. *Georgia Association of Retarded Citizens v. McDaniel, supra*, 716 F.2d at 1578-79. First, the statutes have two distinct purposes. §504 is a civil rights statute "patterned after Title VI of the Civil Rights Act of 1964." *Community Television of Southern California v. Gottfried, supra*, 103 S.Ct. at 892; *New York Association for Retarded Children v. Carey, supra*, 612 F.2d at 649 (§504 "intended to be part of the general corpus of discrimination law"). The EAHCA, by contrast, is a funding act. *Board of Education v. Rowley, supra*. As a consequence of this distinction, the EAHCA applies only within those states that accept EAHCA grants. Section

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21. In 1979, DOE assumed the functions of the Department of Health, Education and Welfare in the area of education. For simplicity, we refer to both agencies as "DOE."

22. *See also* 41 Fed. Reg. 56967 (Dec. 30, 1976).

23. §504 is enforced by DOE's Office for Civil Rights. The EAHCA is enforced by DOE's Office of Special Education and Rehabilitation Services.

504, however, applies wherever federal assistance is present, whether in the form of federal education funds or otherwise. It would be bizarre indeed to conclude that Congress intended to repeal §504 with respect to certain types of education claims in states such as Arizona, which accepts EAHCA grants, but not in New Mexico, which does not.[24] As the Eleventh Circuit has observed, such considerations point strongly to the conclusion that, even in their areas of overlap, the two acts grant independent substantive rights. *Georgia Association of Retarded Citizens v. McDaniel, supra,* 716 F.2d at 1579.

It is not merely the content of the two statutes that argues against any inference that one was intended to repeal the other. The legislative history shows unequivocally that Congress intended precisely the opposite. Referring to §504, the Senate Report on the EAHCA stated:

> In earlier legislation adopted by this Committee and enacted into law, strong positive action was taken to prohibit discrimination on the basis of handicapping conditions in all programs receiving Federal funds. Regulations implementing this program (§504 of the Rehabilitation Act of 1973) are in draft form at this time. The Committee takes further steps in this legislation to provide that positive action be taken against erroneous classification of poor, minority and bilingual children and against the invalid use of testing.[25]

Thus, the Senate acknowledged that §504 was in force, that regulations thereunder were in preparation, and that the EAHCA was intended not to supplant §504 but to afford "further" protections. The Senate additionally stated:

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24. *See New Mexico Association for Retarded Citizens v. New Mexico, supra.*

25. S. Rep. No. 94-168, 94th Cong., 1st Sess. 28 (1975), reprinted in 1975 U.S. Code Cong. & Adm. News 1425, 1451-52.

> [T]he Committee expects the Commissioner of Education to take such action as may be necessary consistent with his responsibilities under §504 of the Rehabilitation Act of 1973 to assure that physical education and all other services normally provided to all children are made available for handicapped children.[26]

In the face of explicit indications of Congressional intent *not* to preclude the application of §504, and in the absence of even a suggestion to the contrary, it is impossible to find that an implied repeal occurred. *Kremer v. Chemical Construction Co., supra.*

The circumstances of this case are therefore totally unlike those in such cases as *Brown v. General Services Administration*, 425 U.S. 820 (1976). In *Brown*, the Court found extensive evidence in the language and legislative history of Title VII of the Civil Rights Act of 1964 that Congress had intended, by passing that statute, to create the sole cause of action for federal employment discrimination. However, the Court also made clear that absent evidence of Congressional intent to restrict potential causes of action, one statute will not be held to have precluded or repealed the rights available under another. Thus, for example, Title VII does not preempt claims under 42 U.S.C.A. §1981 with respect to private employment. *Brown*, 425 U.S. at 833; *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).[27] As demonstrated above, and as the Eleventh Circuit has observed

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26. S. Rep. No. 94-168, *supra*, at 12, reprinted in 1975 U.S. Code Cong. & Adm. News, *supra*, at 1436.

27. *See also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 150 n.5 (1970) (Title II of Civil Rights Act of 1964 did not preclude cause of action on same facts under 42 U.S.C. 1983 and Fourteenth Amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (no preclusion of one civil rights statute by another); *cf. Carlson v. Green*, 446 U.S. 14 (1980) (*Bivens* action available in the absence of "explicit Congressional declaration" that such is precluded by Federal Tort Claims Act).

in distinguishing *Brown*, a finding of Congressional intent to preclude or repeal simply cannot be made with respect to the EAHCA and §504. *Georgia Association of Retarded Citizens v. McDaniel, supra*, 716 F.2d at 1579.

Likewise distinguishable from the present case are *Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366 (1979), and *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1 (1981). In those cases, plaintiffs' claims arose under federal statutes that provided substantive rights together with comprehensive enforcement mechanisms. In both instances, plaintiffs failed to utilize the prescribed enforcement procedures, instead seeking to enforce the statutes via 42 U.S.C.A. §§1985(3) and 1983, respectively. The question was whether the use of these alternative enforcement routes was permissible. As in *Brown*, the Court resolved the issue by examining Congress' intent, concluding in both cases that the legislative history showed evidence of a plan to preclude enforcement via routes other than those specifically prescribed. As we have demonstrated, however, the present case involves an entirely different situation: here there is no evidence that Congress intended by enacting the EAHCA to preclude the assertion of §504 claims based on similar facts.

Moreover, the statutes invoked by plaintiffs in *Novotny* and *Middlesex* — 42 U.S.C.A. §§1985(3) and 1983 — themselves create no rights. Hence, as the Court recognized, neither case presented an issue of implied repeal of substantive entitlements. *Novotny*, 442 U.S. at 376. If — as *Novotny* and *Middlesex* teach — a strong showing of Congressional intent is required before preclusion of an *enforcement route* will be found, surely even more compelling evidence is needed in order to find that Congress actually withdrew *substantive entitlements*. Such evidence is lacking, however, with respect to the rights conferred by §504.

In summary, neither §504 nor §505 contains an exception, express or implied, for cases that also fall within

the scope of the EAHCA. Accordingly, the courts have awarded fees under §505 in numerous cases wherein EAHCA claims were also asserted. *Tatro v. Texas*, 625 F.2d 557 (5th Cir. 1980), *on remand*, 516 F.Supp. 968 (N.D. Tex. 1981), *aff'd, supra, cert. granted, supra; Pratt v Board of Education of Frederick Co.*, 674 F.2d 259 (4th Cir. 1982); *Gregg B. v. Board of Education*, 535 F.Supp. 1333 (E.D. N.Y. 1982); *Patsel v. District of Columbia Board of Education, supra.*[28] As the *Patsel* court observed, 530 F.Supp. at 665-66:

> No indication has been found that the EHA alone must be applied to cases in which the EHA is applicable, i.e. that the two were mutually exclusive. . . . [§505] does not state that fees should not be awarded if the action or proceeding is one which happens to involve rights in addition to those secured by a provision of the Rehabilitation Act. In other words, §505 is not explicitly limited to actions which can be brought only under a Rehabilitation Act provision, such as §504, and no other, such as the EHA. The statute could have been so limited, if that were the intent, since both the EHA and §504 were already in existence, as were their coordinated and consistent regulations. It was not limited, however. . . .
>
> In sum, neither the EHA nor its legislative history indicates that the EHA was intended to be exclusive when compared to §504 . . .

The task confronting this Court in relation to §505 is thus straightforward: the plain language of that statute should be given effect. The judgment of the Court of Appeals on petitioners' motion for attorney's fees under §505 of the Rehabilitation Act must be reversed.

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28. *Contra, Timms v. Metropolitan School Dist., supra; Dept. of Educ. v. Katherine D.*, No. 82-4096 (9th Cir., Nov. 7, 1983).

II. PETITIONERS ARE ENTITLED TO AN AWARD OF ATTORNEY'S FEES UNDER THE CIVIL RIGHTS ATTORNEY'S FEES AWARDS ACT

The Civil Rights Attorney's Fees Awards Act, 42 U.S.C.A. §1988 (hereafter §1988) provides in relevant part:

> In any action or proceeding to enforce a provision of §§1981, 1982, 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

This case is indisputably "an action or proceeding to enforce" 42 U.S.C.A. §1983 ("§1983").[29] The Smiths specifically invoked that statute to redress violations of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Indeed, their original Complaint, which was filed before the effective date of the EAHCA, raised solely constitutional claims. The major Due Process violation asserted was respondents' failure to afford Tommy a hearing before terminating the funding for his public education program. The Equal Protection claim was in essence that the termination of Tommy's education program on the basis of his handicap was without a rational basis, and therefore constituted illegal discrimination.[30] By way of relief, the Smiths sought a preliminary injunction reinstating the

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29. §1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

30. Complaint at 3; Second Amended and Supplemental Complaint at 8.

funding for Tommy's program during the pendency of administrative proceedings, and an order permanently enjoining respondents to provide Tommy with education services.[31]

In their Amended Complaints, the Smiths also raised alternative statutory bases for the foregoing relief. Certainly, the assertion of these statutory theories did not lessen the viability of the §1983 claims under the Due Process and Equal Protection Clauses, nor did it remove the case from the scope of §1988. On the contrary, a case raising substantial constitutional claims under §1983 remains within §1988 even when other legal grounds are also advanced to support the relief sought. *Maher v. Gagne, supra.*[32]

A plaintiff "prevails" within the meaning of §1988 if he "succeeds on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Id.*, 103 S. Ct. at 1939 (1983). It is of no moment that such benefit is obtained via settlement rather than through an adjudication. *Maher v. Gagne, supra.*

Petitioners meet all of the requirements for an award of fees under §1988. First, their constitutional claims were clearly substantial. The District Court found that petitioners were likely to succeed on their Due Process claim of entitlement to a prior hearing and granted a preliminary injunction on that basis, citing *Goldberg v. Kelly*, 397 U.S. 254 (1970). Moreover, the courts have held that the deprivation of educational services to a child on account of the child's handicap raises a substantial Equal Protection Claim. *PARC v. Pennsylvania, supra; Mills v. Board of Education*, 348 F. Supp. 866 (D. D.C. 1972); *Fialkowski v. Shapp*, 405 F.Supp. 946 (E.D. Pa. 1975); *William S. v. Gill*, 536 F. Supp. 505 (N.D. Ill. 1982).

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31. *Id.*

32. Constitutional claims are "substantial" if they are not inescapably frivolous under previous decisions. *Hagans v. Lavine*, 415 U.S. 528, 537-38 (1974).

Furthermore, petitioners obtained the relief they sought: respondents were preliminarily and permanently enjoined to provide free education services to Tommy. Unquestionably, then, petitioners more than met the *Hensley* requirement ("some of the benefit . . . sought in bringing suit") for an award under §1988.

Notwithstanding the existence of that statute, however, the Court of Appeals held that it could find no "affirmative congressional sanction for fees in this situation." This was because petitioners' constitutional claims rested on the same factual bases as their claims under the EAHCA. 703 F.2d at 7-8. In effect, the court exempted from the scope of §1988 those cases in which the EAHCA would have provided an alternative basis for the relief sought.

Such a construction of §1988 is totally contrary to this Court's holding in *Maher v. Gagne, supra*. Plaintiff in *Maher* attacked the validity of a state welfare regulation, basing her challenge — as did petitioners herein — on constitutional and federal statutory grounds. The case was eventually settled, and attorney's fees were awarded under §1988. This Court affirmed the award, holding unanimously that the presence of a substantial constitutional claim brought the case within §1988 regardless of whether the statutory claims alone could have resulted in a fee award:[33]

> . . . Congress was acting within its enforcement power in allowing the award of fees in a case in which the plaintiff prevails on a wholly statutory, non-civil-rights claim pendent to a substantial constitutional claim or in one in which both a statutory and a substantial constitutional claim are settled favorably to the plaintiff without adjudication. . . . [S]uch a fee award "furthers the Congressional goal of encouraging suits to vindicate constitutional

33. The concurring opinion in *Maher* makes clear that the entire Court agreed on this point.

> rights without undermining the longstanding judicial policy of avoiding unnecessary decision of important constitutional issues." It is thus an appropriate means of enforcing substantive rights under the Fourteenth Amendment [citations omitted]. . . .
> The legislative history makes it clear that Congress intended fees to be awarded where a pendent constitutional claim is involved, even if the statutory claim on which the plaintiff prevailed is one for which fees cannot be awarded under the Act.

Maher, 448 U.S. at 132-33 and n. 15.

The principle announced in *Maher* has been repeatedly applied in special education cases in which substantial constitutional claims were raised. In *Espino v. Besteiro*, 708 F.2d 1002 (5th Cir. 1983), the Court of Appeals for the Fifth Circuit reversed the denial of a Section 1988 award in a suit asserting that the placement of a handicapped child in a separate cubicle within the schoolroom violated his Due Process and Equal Protection rights. The EAHCA and §504 were also advanced as alternative theories, and relief was ultimately granted solely under the EAHCA. Nevertheless, noting that the constitutional claims had been substantial, the Court of Appeals held that fees should have been awarded under §1988. The Court relied on *Maher v. Gagne, supra*, and also observed, 708 F.2d at 1010:

> Were we to hold, on the facts of this case, that [plaintiff] is not entitled to §1988 fees because the district court did not explicitly ground its relief on §1983, we would in effect be creating a powerful disincentive to settlement in close cases. Where defendants know that a court is more likely to award relief on the basis of a non-fee statute whose application avoids difficult constitutional questions, they will have little incentive to settle their differences with plaintiffs, knowing as they do that a settlement is very likely to cost them substantial attorney's fees.

> Federal dockets are already sufficiently crowded without our creating a disincentive to settlement. Permitting a court to deny §1988 fees by granting relief on the basis of a non-fee statute would also undermine Congress' intent in enacting §1988 to create an incentive for plaintiffs to vindicate violations of their constitutional rights by bringing §1983 actions.

Similar conclusions were reached by the Eighth Circuit in *Monahan v. Nebraska*, 687 F.2d 1164 (8th Cir. 1982), *cert. denied sub nom. Rose v. Nebraska*, 103 S.Ct 1252 (1983); *accord, Robert M. v. Benton*, 671 F.2d 1104 (8th Cir. 1982). The Second Circuit has taken an identical approach. *Hastings v. Maine-Endwell Central School District*, 676 F.2d 893 (2d Cir. 1982); *Jose P. v. Ambach*, 669 F.2d 865 (2d Cir. 1982).[34] *But see Timms v. Metropolitan School District, supra; Department of Education v. Katherine D., supra.*

It does not follow, as the Court of Appeals apparently feared, that the "mere recitation of a §1983 claim" in a special education case will create a right to attorney's fees under §1988. 703 F.2d at 8. The courts retain the power to determine that a constitutional claim asserted via §1983 is insubstantial and therefore cannot support a §1988 award.

The Court of Appeals was also mistaken in its application of *Middlesex County Sewerage Authority v. National Sea Clammers Association, supra*, to this case. In *Middlesex*, the Court found that Congress had intended §1983 to be unavailable to enforce an anti-pollution *statute*. Petitioners in *Middlesex* had sought such enforcement under the "and laws" language of §1983. However, *Middlesex* in no way curtailed the use of §1983 to enforce rights "secured by the Constitution." Moreover,

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34. Other special education cases reaching like results include *Gary B. v. Cronin*, 542 F. Supp. 102 (N.D. Ill. 1982) and *Mattie T. v. Holladay*, 522 F. Supp. 72 (N.D. Miss. 1981).

there exists no other conceivable basis for a finding that the EAHCA was meant to limit the enforcement of constitutional rights via §1983: the EAHCA itself contains no such language, and the legislative history expresses precisely the opposite purpose.[35] *See also Kremer v. Chemical Construction Co., supra* (implied repeal only where "manifest" legislative intent or irreconcilable conflict.)

In short, where the constitutional claim is substantial and plaintiff obtains the relief sought thereunder, the import of §1988 is clear: fees are to be awarded. Here there is no dispute over the substantially of petitioners' claims, nor can there be any doubt that they obtained the relief that they sought. Under these circumstances, the Court of Appeals erred in denying petitioners' request for attorney's fees under §1988.

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35. The legislative history repeatedly refers to cases defining the constitutional rights of handicapped children, and expresses the intent that the grant program authorized by the EAHCA *assist* the states in meeting their constitutional obligations. There is not the slightest suggestion that the statute was intended to curtail the enforcement of constitutional rights. S. Rep. 94-168, *supra*, at 6-8, reprinted in 1975 U.S. Code Cong. & Adm. News, *supra*, at 1430-32; H. Rep. 94-332, 94th Cong., 1st Sess. 3-4, 10 (1975); S. Rep. 94-455 (Conf. Rep.) 94th Cong., 1st Sess. 28-29 (1975), reprinted in 1975 U. S. Code Cong. & Adm. News 1480, 1482; 121 Cong. Rec. 19485 (remarks of Sen. Williams); 19504 (Sen. Schweiker); 19504-05 (Sen. Humphrey); 25534 (Rep. Brademas); 25538 (Rep. Harris); 37027 (Rep. Gude); 37029 (Rep. Michel); 37417 (Sen. Schweiker); 37419 (Sen. Beall); 37420 (Sen. Hathaway) (1975).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the Court of Appeals for the First Circuit.

Respectfully submitted,

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